UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

EDWARD C. HUGLER, Acting Secretary of Labor, United States Department of Labor,	:	
	:	Misc. Action No.
Petitioner,	:	
v.	:	
MANGANO SEWER AND DRAIN, INC. and JONATHAN MANGANO, individually and as custodian of records,	:	
	:	
Respondents.		

MEMORANDUM OF LAW IN SUPPORT OF THE SECRETARY OF LABOR'S MOTION TO COMPEL RESPONDENTS TO PRODUCE DOCUMENTS PURSUANT TO ADMINISTRATIVE SUBPOENAS *DUCES TECUM*

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PRELIMINARY STATEMENT

The Fair Labor Standards Act of 1938, as amended ("the Act" or "FLSA"), grants broad authority to the Department of Labor to access and subpoena employer records in the course of an investigation. Here, Mangano Sewer & Drain, Inc., located at 467 Brook Avenue, Deer Park, NY 11729 ("Mangano Sewer") and Jonathan Mangano (collectively, "Respondents"), have repeatedly refused to produce basic records relating to Respondents' businesses, including payroll and time records, W-2s for employees, and documents pertaining to a related business. Edward C. Hugler, Acting Secretary of Labor, U.S. Department of Labor (the "Secretary"), respectfully petitions this Court pursuant to sections 9 and 11(a) of the Act, 29 U.S.C. §§ 209, 211(a), and Section 49 of the Federal Trade Commission Act, 15 U.S.C. § 49, for an order compelling the Respondents to comply fully with the administrative subpoenas *duces tecum* issued on January 23, 2017.

STATEMENT OF FACTS

On December 8, 2016, the Wage and Hour Division of the U.S. Department of Labor ("Wage Hour") assigned an investigator to conduct an investigation into Mangano Sewer's wage and hour practices. Declaration of Jenna Montesano dated March 31, 2017 ("Montesano Decl.") ¶ 4. On December 13, 2016, Investigator Montesano mailed a letter to Respondents advising them of an on-going investigation, and requesting access to basic records such as employee names, work hours, and pay, as well as information pertaining to any related business entities. *See* Montesano Decl. ¶ 5 & Ex. 1 (appointment letter). On December 28, 2016, Investigator Montesano traveled to Mangano Sewer for an initial conference. Montesano Decl. ¶ 6. At that time, Lauren Mangano – Respondent Jonathan Mangano's wife, and Mangano Sewer's manager

– provided Wage Hour with Mangano Sewer payroll documents for the period 8/11/15 through 12/13/16. *Id.* Ms. Mangano contended that earlier documents were unavailable due to a fire. Montesano Decl. ¶ 7. Respondents provided no time records, tax records, or other documents at that time. *Id.*

Respondents also provided no records relating to any related business entities. Montesano Decl. ¶ 25. Wage Hour is aware of at least one business entity that is related to Mangano Sewer. Emergency Cesspool & Sewer Cleaners Inc. ("Emergency Cesspool"), a corporate entity putatively owned by Lauren Mangano, provides similar services as Mangano Sewer. *See* Montesano Decl. ¶ 24, Exs. 5, 8. The two companies share a single office. *See* Ex. 8; Montesano Decl. ¶¶ 20-22. Respondents' employees perform work under both Mangano and Emergency Cesspool's name. Montesano Decl. ¶ 17. Calls for Emergency Cesspool and Mangano Sewer are routed to the same dispatchers; these dispatchers direct workers to use Mangano Sewer invoices for some jobs and to use Emergency Cesspool invoices for others. *Id.* Indeed, Respondents sometimes used Mangano Sewer timesheets to record hours worked on Emergency Cesspool jobs. Montesano Decl. ¶ 18 & Ex. 5 (sample time record for Emergency Cesspool written on Mangano Sewer timesheet). The companies utilize and distribute a single handbook to employees; this handbook makes clear that the handbook "pertains to [Mangano], Emergency Cesspool []...or any DBA's or newly acquired corporations." Montesano Decl. ¶ 19 & Ex. 6 (excerpt from Respondents' handbook). Ms. Mangano – the putative owner of Emergency Cesspool – works as a manager at Mangano Sewer. *See* Montesano Decl. ¶ 12. Emergency Cesspool even designated Mangano Sewer to accept service of process from the New York Department of State. Montesano Decl. ¶ 20 & Ex. 7 (Division of Corporations entity information for Emergency Cesspool).

On December 23, 2017, Wage Hour issued administrative subpoenas *duces tecum* to the Respondents. Montesano Decl. ¶ 9 & Ex. 2 (subpoenas). The subpoenas were signed by Regional Administrator Mark H. Watson, Jr. and requested, among other documents, records of hours worked, employee payroll records, tax forms, copies of W-2 forms for employees, and materials pertaining to any "related corporate entities, and all other business entities, and all other business operations." *Id.* The subpoenas required Respondents to produce documents by February 9, 2017.

On January 25, 2017, Wage Hour Investigator Nicole Stahl served the subpoenas at 467 Brook Avenue, Deer Park, NY 11729, where they were accepted by Respondents' administrative assistant. Montesano Decl. ¶ 10. The subpoenas required that the Respondents produce the documents to Wage Hour no later than February 9, 2017. *See* Montesano Decl. Ex. 2. Respondents did not comply with the subpoenas on February 9, but did provide some additional records the following week. Montesano Decl. ¶ 11.

These additional records – mainly some time records, some disciplinary records, a few pages from an employee handbook, and drivers' licenses for some employees – do not come close to satisfying Respondents' production obligations pursuant to the subpoenas. Montesano Decl. ¶¶ 11-15. Respondents failed to provide a single W-2 form issued to an employee. Montesano Decl. ¶ 14. Nor did Respondents provide a full set of time records. For example, Respondents provided a disciplinary notice dated for employee "B.C." Montesano Decl. ¶ 12. This notice states that this employee worked for the firm "for a period of nearly 4 years." *Id.* However, Respondents provided only 7 weeks of time records relating to this worker. *Id.* Indeed, of the eleven workers listed on Respondents' payroll register for the week ending 11/9/16, Respondents produced time records for only two workers – Anthony Castro and

Michael Salentino. *See* Montesano Decl. ¶ 13; Ex. 10 (payroll records for week ending 11/09/16). Moreover, Respondents did not produce any payroll, tax forms, corporate ownership, or employee contact information for Emergency Cesspool. Indeed, apart from the joint Mangano Sewer-Emergency Cesspool handbook and two timesheets for one worker, Respondents produced no documents pertaining to Emergency Cesspool. Montesano Decl. ¶ 25.

The Department subsequently made repeated efforts to obtain compliance outside of court. *See* Montesano Decl. ¶ 16 & Ex. 6 (emails dated February 14-15, 2017); Declaration of Elena Goldstein dated March 31, 2017 ("Goldstein Decl.") ¶¶ 4-6 & Ex. 1 (letter dated March 3, 2017). These efforts have been unavailing. Montesano Decl. ¶ 22-23.

ARGUMENT

I. The Secretary of Labor is Authorized by Statute to Issue Subpoenas in Order to Investigate Violations of the FLSA and May Enforce Such Subpoenas in Federal Court.

In support of the Secretary of Labor's enforcement duties, the Act grants the Secretary subpoena power, providing:

> For the purpose of any hearing or investigation provided for in this Act, the provisions of section 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended [. . .15 U.S.C. 49, 50] are hereby made applicable to the jurisdiction, powers, and duties of the Secretary of Labor. . . .

29 U.S.C. § 209.[1] Subpoenas issued under the FLSA are enforceable in federal court. *See* 15 U.S.C. § 49 (providing that if the subject of an agency subpoena disobeys that subpoena, the

[1] Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, provides in pertinent part:

agency "may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence"); *see also Donovan v. Mehlenbacher*, 652 F.2d 228, 230 (2d Cir. 1981) ("[T]he Department of Labor clearly has the power to issue subpoenas in the course of an investigation conducted under statutory authority, and to have those subpoenas enforced by federal courts.") (citing *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 200-01 (1946)).

Judicial review of administrative subpoenas is limited. *In re McVane*, 44 F.3d 1127, 1135 (2d Cir. 1995). To enforce an administrative subpoena, "[a]n agency must only show that (1) the investigation will be conducted pursuant to a legitimate purpose, (2) that the inquiry *may be* relevant to that purpose, (3) that the information sought is not already within [its] possession, and (4) that the administrative steps required have been followed." *NLRB v. American Medical Response, Inc.*, 438 F.3d 188, 192 (2d Cir. 2006) (citations, internal quotation marks and punctuation omitted; emphasis in original); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) ("it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant."). "An affidavit from a government official is sufficient to establish a prima facie showing that these requirements have been met." *In re McVane*, 44 F.3d at 1136. "A subpoena that satisfies these criteria will be enforced unless the party opposing enforcement demonstrates that the subpoena is unreasonable or that compliance would be 'unnecessarily burdensome.'" *EEOC v. United Parcel Service, Inc.*, 587 F.3d 136, 139 (2d Cir. 2009). Here, the administrative subpoenas meet all requirements for

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[T]he Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. . . . [I]n case of disobedience to a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

enforcement and the Respondents cannot meet their burden to show that enforcement would be improper.

a. The Investigation Is Conducted Pursuant to a Legitimate Purpose.

The Act grants the Secretary of Labor broad investigatory powers to determine compliance with its provisions. Section 11(a) gives the Secretary (or his designee) authority to investigate and gather data regarding "wages, hours, and other conditions and practices of employment in any industry subject to" the Act. 29 U.S.C. § 211(a). It also empowers the Secretary to enter and inspect such places and records as he may deem appropriate to determine whether any person has violated the Act. *Id.* Section 11(c) of the Act further requires employers to make, keep, and preserve certain records as prescribed by the Secretary. 29 U.S.C. § 211(c). Pursuant to this mandate, the Department of Labor has issued regulations under the Act requiring employers subject to its terms to keep records of employees' names and contact information, hours worked each workday and total hours worked each work week, total daily or weekly straight time and overtime earnings, total wages paid each period, the date of payment and the pay period covered by the payment, among other items. *See* 29 C.F.R. § 516.2.

Here, the Secretary acts pursuant to his investigatory authority under the FLSA. The purpose of this investigation is to determine whether Respondents and any other person acting as an employer are in compliance with the minimum wage, overtime, and recordkeeping provisions of the Act. Significantly, an agency does not need probable cause of violations for the documents to be relevant or within the Agency's subpoena power. *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950); *Walling*, 327 U.S. at 201. As the Supreme Court has explained, an agency "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that is not." *Morton Salt*, 338 U.S. at 642-43. As in *Morton Salt*, Wage Hour is statutorily empowered to determine whether Respondents have been in compliance with the FLSA; requesting payroll, time, tax and other records from Respondents is a legitimate avenue of inquiry.

b. The Demand for Records Is Relevant to the Secretary's Lawful Purpose.

Courts "broadly interpret relevancy" when enforcing administrative subpoenas. *Amer. Med. Response, Inc.*, 438 F.3d at 192. "The relevance of the sought-after information is measured against the general purposes of the agency's investigation, 'which necessarily presupposes an inquiry into the permissible range of investigation under the statute.'" *In re McVane*, 44 F.3d at 1135. Further, the district court must "defer[] to the agency's appraisal of relevancy, which must be accepted so long as it is not obviously wrong." *Id.*; *see also In re Gimbel*, 77 F.3d 593, 601 (2d Cir. 1996).

The subpoenas seek documents that are clearly relevant to the Secretary's investigation. The time and payroll records demanded relate to Respondents' recordkeeping practices as well as the actual hours worked by employees and wages paid to them. *See* 29 U.S.C. §§ 206, 207 and 211. W-2 forms reflect the names of employees and the amounts paid to them during various years.

Likewise, the documents pertaining to Emergency Cesspool, Respondents' related business entity, are patently relevant to the Secretary's FLSA investigation. Under the Act, "two or more employers may be found to be 'joint employers' where an employee 'performs work…at two or more employers at different times during the workweek... [or] where the employers are not completely disassociated with respect to the employment of an employee.'" *Moon v. Kwon*, 248 F. Supp. 2d 201, 237 (S.D.N.Y. 2002) (quoting 29 C.F.R. § 791.2(b)). Where employees are jointly employed by two entities, "all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of [the Act]." 29 C.F.R. § 791.2(a). Where, as here, "there is an arrangement between the employers to share the employee's services," joint employer liability exists. *Teri v. Spinelli*, 980 F. Supp. 2d 366, 375 (E.D.N.Y. 2013). Joint employers are jointly and severally liable for the FLSA violations of all other joint employers. *See, e.g.*, Paz v. Piedra, No. 09 Civ. 03977, 2012 WL 12518495, at *5 (S.D.N.Y. Jan. 12, 2012).

Here, the Secretary's initial investigation strongly suggests that employees are jointly employed by both Mangano Sewer and Emergency Cesspool. As set forth above, the two entities share office space, employees, and employment manuals. *See* Montesano Decl. ¶¶ 17-22. The putative owner of Emergency Cesspool is a manager of Mangano Sewer, and has designated Mangano Sewer to accept service of process on behalf of Emergency Cesspool. *See* Montesano Decl. ¶ 12 & Ex. 7. The requested documents, including payroll, time records, employee and corporate identification documents, and tax records, are relevant to the Secretary's investigation into the issue of joint employment. Moreover, since hours worked for related, joint employers must be aggregated for the purposes of calculating overtime compensation, information relating to Emergency Cesspool is crucial for understanding the scope and extent of Respondents liability under the Act. *See, e.g.*, *Perez v. Manna 2nd Ave. LLC,* No. 15 CIV. 4655 (JCF), 2017 WL 780812, at *8 (S.D.N.Y. Feb. 28, 2017) (granting summary judgment to Secretary for overtime claim that entailed aggregating hours between multiple corporate entities).

In sum, all of the documents sought are relevant to the Department's investigation into Respondents' employment and recordkeeping practices under the FLSA and therefore are the proper subject of the subpoenas *duces tecum*.

c. The Documents Demanded Are Not within the Agency's Possession.

The remaining documents sought by the subpoenas *duces tecum* are not within the Department's possession. As set forth in the Statement of Facts and the Declaration of Jenna Montesano, although Respondents have provided some time, payroll, and tax records, their submission is far from complete. *See* Montesano Decl. ¶¶ 12-14, 16, 23. The Secretary seeks the records and documents that have not yet been produced. These documents include:

- W-2s for Mangano Sewer employees,
- Mangano Sewer's records of hours worked and wages paid not already produced, andb
- Documents pertaining to Emergency Cesspool, including payroll, time records, employee contact information, and corporate identification documents, W-2s, and tax records.

d. The Administrative Steps Required by the Statute Have Been Followed.

The Secretary followed all the administrative steps required for subpoenas *duces tecum*. The subpoenas were issued pursuant to statutory authority and were signed by Mark H. Watson, Jr. Regional Administrator of the Wage and Hour Division. *See* 15 U.S.C. § 49; 29 U.S.C. § 209; Montesano Decl. ¶ 9, Ex. 2. By the Secretary of Labor's Order 05-2010, the Wage and Hour Administrator is delegated the responsibility to issue administrative subpoenas under section 9 of the Fair Labor Standards Act, 29 U.S.C. § 209. 75 Fed. Reg. 55352, 55354 (Sept. 10, 2010). The same order re-delegates this subpoena authority to the Regional Administrators of the Wage and Hour Division. *Id.*

On March 21, 2016, Wage Hour Investigator Nicole Stahl served the subpoenas on Respondents' administrative assistant at 467 Brook Avenue, Deer Park, NY 11729, who accepted those papers on behalf of Respondents. Montesano Decl. ¶ 10. Following service of the subpoena, Respondents' attorney at first agreed to provide responsive documents, before failing to do so. Goldstein Decl. ¶ 4. Accordingly, the Respondents have actual knowledge of the Subpoena, and all relevant administrative steps required by the Act have been followed.

Because all of the criteria set out by the Second Circuit are met, this Court should enforce the Subpoena.

II. The Demand is Not Unreasonably Broad or Burdensome.

As explained, "[a] subpoena that satisfies [the four] criteria will be enforced unless the party opposing enforcement demonstrates that the subpoena is unreasonable or that compliance would be 'unnecessarily burdensome." *United Parcel Serv., Inc.*, 587 F.3d at 139 (quoting *Amer. Med. Response, Inc.*, 438 F.3d at 193). Respondents cannot meet that burden here because the subpoenas are plainly reasonable and are not unduly burdensome.

As set forth above, the subpoenas seek only documents that are clearly related to Wage Hour's lawful investigation of Respondents and their employment practices. *See, e.g.*, Montesano Decl. ¶ 5. Moreover, the records requested are business documents that are required to be kept by law; Respondents should be able to produce such documents in the ordinary course of their business. *See generally* 29 U.S.C. § 211; 29 C.F.R. Part 516; 29 C.F.R. § 516.2 (requiring that an employer "maintain and preserve payroll and other records containing" employees' full names, addresses, work schedules, hourly rates of pay, and hours worked); *id.* § 516.5 (requiring the preservation of certain records for three years); *id.* § 516.6 (requiring the preservation of certain records for two years); *id.* § 516.7 (requiring that records "be available for inspection and transcription by the [Wage and Hour] Administrator or a duly authorized and designated representative"). Likewise, as Emergency Cesspool is functionally intertwined with Mangano Sewer and the two share a common office, *see supra*, Respondents plainly have custody over documents pertaining to Emergency Cesspool.

Wage Hour has provided Respondents with ample opportunities to produce documents. While Wage Hour has made every effort to resolve this matter amicably, Respondents have not – and will not – comply absent an order from this Court.

III. An Order to Enforce is Necessary to Prevent the Loss of Evidence and a Lapse in the Statute of Limitations.

Respondents' ongoing failure to comply with Wage Hour's subpoenas undermines the government's ability to fully enforce the Act. The FLSA typically has a two-year statute of limitation, which is extended to three years for willful violations. 29 U.S.C. § 255. Since violations under the Act accrue on a workweek basis, Respondents' on-going failure to comply with the subpoenas could render a portion of the investigation barred by the statute of limitations. Allowing an employer to delay investigation and thereby run down the statute of limitations effectively circumvents the requirements of the Act and undermines the Wage Hour's enforcement authority. Likewise, this conduct raises the likelihood that evidence will be lost or become stale in the intervening time period. As set forth in the Declaration of Investigator Montesano, Wage Hour has diligently attempted to work with Respondents to obtain these documents. Respondents' obstinate refusal to comply with Wage Hour's administrative subpoenas undermines the Secretary's investigation and could interfere with the Secretary's effort to make workers whole. Accordingly, an order from this Court compelling compliance with the subpoenas *duces tecum* is necessary and appropriate under these circumstances.

Likewise, in order to preserve the Secretary's investigatory authority, and to mitigate the effects of Respondents' delaying and obstructionist conduct on this investigation, the Secretary respectfully requests that the Court toll the applicable statute of limitations from February 9, 2017, the original return date on the subpoenas, until such time as Respondents have fully complied with them. *See Wall v. Constr. & Gen. Laborers' Union, Local 230*, 224 F.3d 168, 176 (2d Cir. 2000) ("A defendant may be equitably estopped from asserting the statute of limitations in cases where the plaintiff knew of the existence of his cause of action but the defendant's conduct caused [the plaintiff] to delay in bringing his lawsuit'") (internal quotation marks omitted).

CONCLUSION

The subpoenas *duces tecum* issued to Respondents Mangano Sewer and John Mangano by Wage Hour are procedurally sound, reasonable, and seek relevant material not already in the Department's possession. Further, compliance will not be unnecessarily burdensome or unreasonable. Accordingly, the Secretary respectfully submits that the subpoenas must therefore be summarily enforced and requests an order tolling the statute of limitations from the date Respondents failed to comply until such date as the Secretary informs the Court that they have complied in full.

DATED: 4/4/17
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